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86th Session 1998

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Contract labour

Fifth item on the agenda

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INTRODUCTION

On 19 June 1997 the International Labour Conference, meeting in Geneva at its 85th Session, adopted the following resolution:

> The General Conference of the International Labour Organization,
>
> Having adopted the report of the Committee appointed to consider the sixth item on the agenda,
>
> Having in particular approved as general conclusions, with a view to the consultation of governments, proposals for a Convention and a Recommendation concerning contract labour,
>
> Decided that an item entitled "Contract Labour" shall be included in the agenda of its next ordinary session for a second discussion regarding the proposed adoption of a Convention and a Recommendation concerning contract labour.

By virtue of this resolution and in accordance with article 39, paragraph 6, of the Standing Orders of the Conference, the Office is required to prepare, on the basis of the first discussion by the Conference, the texts of a proposed Convention and Recommendation and to communicate them to governments so as to reach them not later than two months from the closing of the 85th Session of the Conference, asking them to state within three months, after consulting the most representative organizations of employers and workers, whether they have any amendments or wish to present any comments.

The purpose of the present report is to transmit to governments the texts of the proposed Convention and Recommendation based on the Conclusions adopted by the Conference at its 85th Session.

In accordance with the Standing Orders of the Conference, any amendments or comments with regard to the proposed texts should be submitted as soon as possible and in any case so as to reach the Office in Geneva not later than 30 November 1997. Governments which have no amendments or comments to put forward are asked to inform the Office by the same date whether they consider that the proposed texts are a satisfactory basis for discussion by the Conference at its 86th Session.

In accordance with article 39, paragraph 6, of the Standing Orders, governments are requested to consult the most representative organizations of employers and workers before they finalize their replies and to indicate which organizations they have consulted. This is also required by Article 5(1)(a) of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), for countries which have ratified this Convention. The results of the consultation should be reflected in the governments' replies.

PROPOSED TEXTS

The texts of a proposed Convention and Recommendation concerning contract labour are given below. These texts are based on the Conclusions adopted by the International Labour Conference following the first discussion at its 85th Session.

In accordance with the practice established in 1988, the report of the Committee appointed by the Conference to consider this item is being communicated to member States in its entirety, together with the record of the discussions in the plenary session (see *Provisional Record* No.18 (Rev.), attached).

A number of drafting changes have been incorporated in the proposed instruments in the interest of greater clarity, to bring the various language versions of the text into line with each other or to harmonize certain provisions.

In the commentary below, the Office will seek to obtain clarification on possible problems which either were raised during the discussions in the Committee and in the plenary session or are suggested by a more careful reading of the provisions in the proposed instruments. The Office has not proposed new formulations or a major reorganization of the text in view of the discussions which had led to its adoption. Members may wish to consider making specific proposals in their comments for inclusion in Report V(2), which the Office is to prepare in accordance with article 39, paragraph 7, of the Standing Orders of the Conference.

Proposed Convention

Article 1

(Point 5 of the Proposed Conclusions)

The definition of "contract labour" adopted by the Committee was intended to make it clear that the term should refer to work that is performed personally by the worker and that the definition should apply to both bilateral (direct) and triangular (indirect) relationships but not to commercial arrangements. The draft instruments aim at addressing the following different situations:

(1) a direct, bilateral relationship between an individual worker and a user enterprise, without a mutually expressed intention to establish an employment relationship; and

(2) an indirect, triangular relationship in which either:

  (a) a worker performs work for a user enterprise pursuant to a contractual arrangement between this enterprise and another enterprise which is the employer of the worker (sometimes referred to as the subcontractor); or

  (b) a worker performs work for a user enterprise after having been referred to it by an intermediary who is not the employer of the worker.

In each of these cases, the work is performed under actual conditions of dependency on or subordination to the user enterprise which characterize an employment relationship.

In the course of the discussions, the idea of a contractual arrangement not involving a contract of employment between the user enterprise and the worker was removed by the Committee from the definition of "contract labour". This notion now appears only in the provision concerning the scope of the instrument (draft Article 2, paragraph 1, which was Point 6 of the Conclusions). The question arises as to whether it should not indeed be a key element in the very definition of the subject-matter being addressed. Otherwise, the impression might be given that by definition contract labour also involves situations in which a contract worker and a user enterprise have established an employer-employee relationship, whereas a contract labour relationship presupposes that no contract of employment has been concluded by the worker and the user enterprise.

Attention may also be drawn to divergences in terminology in the text with regard to direct or indirect references to contracts of employment in draft Article 1(b) and (c) and draft Article 2(1). In the interest of consistency, a single concept, whether embodied in the expression "contract of employment", "recognized contract of employment", "formal employment relationship" (derived from being formally the employer) or another term could be used throughout the text.

Members should also consider whether the use of the word "similar" in the definition, with reference to conditions of dependence or subordination, is necessary. If there is in fact a disguised employment relationship between the user enterprise and the worker, the conditions of dependency and subordination would automatically be the same as those of any other employer-employee relationship. To avoid the impression that a third category of workers is being created, it might be preferable to delete the phrase "are similar to those that".

As regards the translation of the term "contract labour" in French and Spanish, Members may wish to express their views on the following suggested alternatives to the phrase *travail en sous-traitance*: (a) *travail sous contrat* (a suggestion made during the first discussion), (b) *travail sous contrat pour l'exécution d'un certain travail ou la fourniture de certains services* (the phrase based on section L.125-2 of the French Labour Code), or to suggest others. If a lengthy definition were to be chosen, it could be abbreviated for purposes of subsequent references in the text.

Article 2

(Points 6, 7 and 8)

Since Points 6, 7 and 8 of the Conclusions were linked, they have been placed together and renumbered respectively as paragraphs 1, 2, and 3 of Article 2 of the proposed Convention.

Two drafting changes have been introduced by the Office in the first sentence of paragraph 2 of Article 2 of the proposed Convention: the word "scope" has been replaced by "application" and the words "from all or any provisions of its Part V" have been replaced by the phrase "certain provisions thereof".

Concerning the provision regarding the exclusion of "workers who, in accordance with national law and practice, have a recognized contract of employment with the user enterprise", see the comments made under Article 1 above.

As regards the final sentence of proposed Article 2, paragraph 1 (the exclusion of employees of private employment agencies who are made available to a user enterprise to perform contract labour), account should be taken of the provisions of the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation, which provide for a certain protection (but not the same as the draft instruments) for this category of workers.

Article 5

(Point 11)

During the Committee discussions, it was suggested that the formulation of Article 5, which reproduces the new text introduced by the Committee as Point 11 of the Conclusions, might be revisited during the second discussion. The Office considers that this Article may need to be reviewed together with Article 6 of the proposed Convention and Paragraphs 4 and 5 of the proposed Recommendation. These provisions suggest the need to distinguish more clearly between the two categories of contract workers from the following points of view: the comparator groups for purposes of equality of treatment (see Paragraph 4 of the proposed Recommendation), and the content of the protection to be afforded. Depending upon the category into which contract workers fall — those with a contract of employment and those without such a contract — the comparator group for the purposes of equality of treatment may be different. As regards the content of the protection, the need for specific protection may seem to be particularly relevant for those contract workers without a contract of employment. For contract workers with a contract of employment, the issue may rather be one of allocation of responsibility, as referred to in Paragraph 8(1) of the proposed Recommendation, in order for the rights in question to be effectively protected under labour and social security laws. Members may wish to express their views on a possible reformulation of these provisions.

Article 6

(Point 12)

The Office wishes to refer to the comments under Article 5 above.

Article 7

(Point 13)

The Office wishes to draw attention to the difference between the provisions of Article 7 of the proposed Convention and Paragraph 5 of the proposed Recommendation and invites Members to comment on the limited scope of Article 7 which addresses only the situations in which contract labour is already in use.

Article 8

(Points 4, 14 and 15)

Since the provisions of Points 4, 14 and 15 of the Conclusions adopted by the Committee relate to the same issue, namely methods of application, the Office has placed them together as separate paragraphs of Article 8 of the proposed Convention. Minor drafting changes have also been introduced in paragraph 2 of this Article.

Proposed Recommendation

Paragraph 1

Since the Preamble to the draft Recommendation already notes that the Recommendation supplements the Convention, the word "supplement" has been deleted from the text, which has been adjusted accordingly.

Paragraph 2

Since, according to Paragraph 1, the proposed Recommendation would be applied in conjunction with the Convention and since the definitions in paragraphs 1, 2 and 3 of Point 18 of the Conclusions as adopted by the Committee were identical to the definitions in what is now Article 1 of the proposed Convention, they have been omitted in the proposed Recommendation. Thus, Paragraph 2 of the proposed Recommendation retains only paragraph 4 of Point 18 of the Conclusions, redrafted with an appropriate cross-reference to Article 1(a) of the proposed Convention. In addition, the word "only" has been deleted as redundant in subparagraph (g) of Paragraph 2, since the word "single" already appears in this clause.

Paragraph 4

(Point 20)

The Office has made no changes to this Paragraph but wishes to draw the attention of Members to the desirability of considering this provision together with other relevant provisions, as suggested in its comments under Article 5 of the proposed Convention.

Paragraph 5

(Point 21)

To take into account concerns expressed in the Committee with regard to the meaning of the word "assimilated", the Office invites Members to comment on whether the phrase "recognized as" or "treated as" might be considered as a more appropriate wording, which would also make it clear that this text is not intended to provide for treatment which might lead to "workers performing contract labour" being seen as a third category of workers.

With regard to the relationship between this Paragraph and Articles 5 and 7 of the proposed Convention, reference is made to comments appearing above under these two articles.

Paragraph 8

(Point 24)

In view of the concerns expressed in the Committee with regard to the meaning of the word "apportion", the Office has replaced it by the word "allocate".

Paragraph 9

(Point 25)

The text of Point 25 of the Conclusions was identical to the original Office text of Point 23. However, some further drafting changes have now been introduced by the Office in the English text to make it more easily understood, as is the case in the French text, that the provision would apply to all kinds of situations in which joint and several responsibility might come into play. Therefore, the words "and the user enterprise" have been added after the word "subcontractor" and the word "among" has been replaced by the word "by".

Paragraph 14

(Point 30)

The text of Point 26 of the original Office text allowed for different interpretations to permit addressing the matter either from the perspective of both sending and host countries or solely from the point of view of host countries, i.e. countries in which contract labour is performed. The Committee changed the text to specify that the matter is to be treated from the viewpoint of the host country only. A minor drafting change has been made in the text of the corresponding Paragraph of the proposed Recommendation: in Paragraph 14 the words "The Member" have been replaced by "A Member", to use the appropriate article, according to ILO practice, for an instrument that does not refer to any particular Member as it is not subject to ratification.

Proposed Convention concerning contract labour

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 86th Session on June 1998, and

Having regard to the growing recourse to contract labour, and recognizing that it is appropriate to adopt new standards on the subject with a view to ensuring that contract workers enjoy adequate protection,

Having decided upon the adoption of certain proposals with regard to contract labour, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this day of June of the year one thousand nine hundred and ninety-eight the following Convention, which may be cited as the Contract Labour Convention, 1998:

Article 1

For the purposes of this Convention:

(a) the term "contract labour" means work performed for a natural or legal person (referred to as a "user enterprise") by a person (referred to as a "contract worker") where the work is performed by the worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice and where either:

  (i) the work is performed pursuant to a direct contractual arrangement between the worker and the user enterprise; or

  (ii) the worker is provided for the user enterprise by a subcontractor or an intermediary;

(b) the term "subcontractor" means a natural or legal person who performs work for a user enterprise under a contractual arrangement with it, other than a contract of employment;

(c) the term "intermediary" means a natural or legal person who makes contract workers available to a user enterprise without becoming formally the employer of these workers.

Article 2

(1) The Convention shall apply to all branches of economic activity and to all contract workers. It shall not apply to workers who, in accordance with national law and practice, have a recognized contract of employment with the user enterprise. It

shall not apply to employees of private employment agencies who are made available to a user enterprise to perform contract labour.

(2) The competent authority, after consulting the most representative organizations of employers and workers, may exclude from the application of the Convention or of certain provisions thereof:

(a) other particular categories of contract workers who otherwise enjoy adequate protection; or

(b) particular branches of economic activity when the application of the Convention in respect of them would raise special problems of a substantial nature.

(3) A Member which ratifies the Convention shall specify, in its first report under article 22 of the Constitution of the International Labour Organization, any exclusion of which it avails itself under paragraph 2 and give the reasons therefor.

Article 3

The Member shall ensure that adequate measures, in accordance with national law and practice, are taken to prevent accidents and injury to the health of contract workers arising out of, linked with or occurring in the course of contract labour.

Article 4

Measures shall be taken, in accordance with national law and practice:

(a) to provide adequate protection in relation to the payment of:

(i) amounts due to contract workers for the work performed; and

(ii) any social insurance contributions payable on behalf of such workers in relation to this work;

(b) to ensure that the responsibilities for fulfilling the financial obligations envisaged in subparagraph (a) above are clearly determined; and

(c) to ensure that contract workers receive compensation in case of injury or disease resulting from the performance of contract labour.

Article 5

The Member shall promote equality of treatment between contract workers and workers with a recognized employment relationship, taking into account the conditions applicable to other workers performing work which is essentially similar, under similar conditions.

Article 6

(1) Measures shall be taken to ensure that contract workers receive the same protection as workers with a recognized employment relationship with regard to:

(a) the right to organize and the right to bargain collectively;

(b) freedom from discrimination in employment and occupation on the basis of race, colour, sex, religion, political opinion, national extraction or social origin;

(c) minimum age.

(2) Measures shall be taken, as appropriate, to ensure that contract workers enjoy adequate protection as regards:

(a) working time and other working conditions;

(b) maternity protection;

(c) occupational safety and health;

(d) remuneration;

(e) statutory social security.

Article 7

The Member shall take measures to ensure that rights or obligations under labour or social security laws or regulations are not denied or avoided when contract labour is used.

Article 8

(1) The Convention shall be applied by means of laws or regulations or by any other means consistent with national practice, such as court decisions, arbitration awards or collective agreements.

(2) Effective measures appropriate to the means chosen pursuant to paragraph 1 shall be taken to ensure the proper application and enforcement of regulations or provisions concerning contract labour through adequate inspection or otherwise.

(3) Adequate remedies, including penalties where appropriate, shall be provided for and effectively applied in case of violations of the regulations or provisions referred to in paragraph 2.

Article 9

The provisions of the Convention shall not affect more favourable provisions under other international labour Conventions applicable to the workers concerned.

Proposed Recommendation concerning contract labour

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 86th Session on June 1998, and

Having decided upon the adoption of certain proposals with regard to contract labour, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Contract Labour Convention, 1998;

adopts this day of June of the year one thousand nine hundred and ninety-eight the following Recommendation, which may be cited as the Contract Labour Recommendation, 1998:

1. The provisions of this Recommendation should be applied in conjunction with those of the Contract Labour Convention, 1998 (hereafter referred to as "the Convention").

2. In determining, for the purposes of the definition of the term "contract labour", whether the conditions of dependency or subordination referred to in Article 1 (a) of the Convention are met, a Member could consider one or more criteria, including but not limited to, the following:

(a) the extent to which the user enterprise determines when and how work should be performed, including working time and other conditions of work of the contract worker;

(b) whether the user enterprise pays amounts due to the contract worker periodically and according to pre-established criteria;

(c) the extent of supervisory authority and control of the user enterprise over the contract worker in respect to the work performed, including disciplinary authority;

(d) the extent to which the user enterprise makes investments and provides tools, materials and machinery, among other things, to perform the work concerned;

(e) whether the contract worker can make profits or run the risk of losses in performing the work;

(f) whether the work is performed on a regular and continuous basis;

(g) whether the contract worker works for a single user enterprise;

(h) the extent to which the work performed is integrated into the normal activities of the user enterprise;

(i) whether the user enterprise provides substantial job-specific training to the contract worker.

3. Appropriate measures should be taken to ensure that contract workers are informed, in an appropriate and easily understandable manner, about their conditions of work and amounts due to them, including how these amounts will be determined.

4. Measures should be taken, as appropriate, to ensure that contract workers are afforded equal treatment with employees of the user enterprise or, as the case may be, with employees of the subcontractor or of the intermediary, for performing work which is essentially similar, under similar conditions and requiring similar qualifications.

5. In specified circumstances (for example, where contract labour is used mainly or solely for the purpose of denying rights or avoiding obligations under labour or social security laws and regulations), contract workers should be assimilated to employees of the user enterprise or, as the case may be, to employees of the subcontractor or of the intermediary.

6. In accordance with national law and practice, contract workers should not be made available to a user enterprise to replace workers of that enterprise who are on strike.

7. Measures should be taken to ensure that contract workers may refuse to perform work which they have reasonable justification to believe poses a serious danger to their safety and health.

8. (1) National law and practice might allocate the respective responsibilities of the subcontractor (or the intermediary, as the case may be) and the user enterprise for fulfilling obligations towards contract workers, taking into account the extent of the workers' dependency on or subordination to them.

(2) When the party responsible for fulfilling the obligations referred to in subparagraph (1) does not meet them, the other party, where appropriate, should be made responsible for doing so.

9. To the extent provided for by national law, financial obligations towards a contract worker might be jointly and severally shared by the subcontractor and the user enterprise or by the intermediary and the user enterprise, or by all of them, as the case may be.

10. In the event of insolvency of the user enterprise, the subcontractor or the intermediary, the outstanding claims of a contract worker should be given the same priorities as those established by national law and practice with regard to a worker's claims against his or her employer.

11. (1) Recourse to contract labour might, in accordance with national laws and regulations, be made subject to an obligation incumbent on the subcontractor or the intermediary to register with or to obtain a licence from the competent authority.

(2) Registration or licensing might depend upon the subcontractor or the intermediary demonstrating its viability and capacity to meet its obligations towards contract workers, or posting a bond sufficient to cover its obligations to such workers.

12. (1) Measures appropriate to national conditions should be taken, where necessary, to encourage collective bargaining as a means of determining and improving the terms and conditions of work of contract workers.

(2) Any obstacles to the exercise of the right of contract workers to join organizations of their choice and to participate in the activities of such organizations should be identified and eliminated.

13. Members should, where possible, compile, keep up to date and make publicly available statistics and other information on contract labour.

14. A Member should take measures, as appropriate, to provide protection to contract workers from other countries who perform work in its territory.

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